



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CIVIL APPEAL NO. 83 OF 2015.

MAKHAPILA J.E. MWANGALE.....APPELLANT

VERSUS.

TITUS MAONGA.....RESPONDENT

[An Appeal from the Ruling delivered on 10th day of November, 2015 by Hon. J. King'ori – CM].

JUDGMENT.

The appellant Makhapila J.E. Mwangale was the defendant in Bungoma CMCC No. 175/2007 and the Respondent Titus Maonga was the Plaintiff. During the proceedings on 6.9.2015 the appellant raised a Preliminary Objection to the proceedings on the grounds;

(a) That the entire proceedings are a nullity and defective. The court should strike out the plaint as defective as the verifying affidavit as null and void as the verifying affidavit was sworn by a person who is unqualified to do so.

On 27.10.2015 M/s Change for the Respondent responded to the Preliminary Objection opposing the preliminary objection submitting that;

M/s Change:

The Verifying affidavit was sworn by a person without a practicing certificate. The initial pleadings were amended by consent and amended plaint dated 16.6.2008 filed. The affidavit in support sworn on 14.2.2007 was by Mr. Makokha. The authority relied upon for the Preliminary objection is clear. The amended plaint became the original cause of action and the claim thereon is substituted for the claim originally. Even if the affidavit may have been sworn by an unqualified person, there is now another affidavit supporting the claim. In accordance with order 19(7) an affidavit notwithstanding defects may be received by the court. Under Article 159, justice shall be done without undue regard to technicalities. Thirdly the authority cited by the applicant was that of an Advocate who prepared the charge did not have a practicing certificate. The papers herein were drawn by herself. It is not alleged that she did not have a practicing certificate. The Preliminary objection is brought in bad faith meant to delay suit and should be dismissed.

The learned trial magistrate reserved his ruling and delivered the same on 10.11.2015 in which he dismissed the Preliminary objection stating in his Ruling;

However, the pleadings herein were amended by consent of the parties and an amended plaint duly filed with a sporting affidavit by the plaintiff sworn before Simiyu Makokha Advocate. That supporting affidavit has not been challenged. The amended plaint is the current and subsisting pleadings and if there is a Preliminary Objection to raise, it should be on the proceedings. The defendant should have raised his Preliminary Objection before the consent entered herein by the Counsels for the parties on 19.5.2008 and filed on 29.5.2008. With due respect the Preliminary Objection has been raised in bad faith. It has no merit and I disallow it. Costs in cause.

Dissatisfied with the ruling of the appellant filed this appeal on the following main grounds;

- i). The learned Trial Magistrate erred in law and fact when he failed to make a finding that the notice of Preliminary objection had been raised on a point of law and not in bad faith.**
- ii). The learned Trial Magistrate erred in law and fact when he failed to make a finding that since it was now clear to the court that affidavit verifying plaint in the instant case before the court had been commissioned by an Advocate who had not taken out a practicing certificate to that effect, the pleadings filed together with the said affidavit before court were incompetent.**

iii) The learned Trial Magistrate erred in law and fact when he misdirected himself in holding that a Preliminary objection ought to have only been raised before the pleadings herein were amended and or at the amendment stage thereby offending the provisions of the law which state that a Preliminary objection on a point of law can be raised at any time of procedures as long as the matter is pending conclusion.

iv) The learned Trial Magistrate erred in law and fact when he misdirected himself in finding that since the Respondent had amended pleadings and affidavit verifying amended plaint commissioned by a different Advocate whose practicing certificate was not an issue, the issue is illegally and or incompetence had been done away with.

M/s Change opposed the appeal. The court issued direction that the appeal be canvassed by way of written submission. The appellant who was acting in person filed his written submission and M/s Change filed the Respondents Submission.

The appellant in his submission submitted the suit filed on 17.4.2007 was through a plaint and verifying affidavit sworn by Nelson Luchu Nakhone who did not have a current practicing certificate. That being so, then the suit which was filed was incomplete abinitio and would not be cured by any amendment; whether by consent or otherwise. He submits that lack of a verifying affidavit goes to the root of the suit and is not a technical issue or procedural technicality which can be cured by Article 159 of the Constitution of Kenya 2010.

M/s Change for the Respondent submitted that although the original Plaint was filed and Verifying affidavit sworn by the Late Nakhone who did not have a practicing certificate, there was a consent between Counsel where an amended plaint was filed and which is the current pleading in the suit. Counsel submits that on the authority of Supreme Court in *National Bank Ltd -Vs- Anaj Warehousing Ltd* an instrument is not invalidated by the fact of having been prepared by an advocate who at the time was not holding a current practicing certificate.

The issue for determination in this appeal is whether the amended plaint replaced the original plaint together with its defects, or the original plaint's defects were such that it would not be cured by any amendment. Where a pleading has been amended under Order 8 Civil Procedure rules, the effect is that the amended pleadings replace the previous pleadings. The amended pleadings becomes the operative basis for the suit. It is not therefore proper to state that the basis of the suit will be the previous pleadings. In this appeal, an amended plaint having been filed by consent, it became the pleadings and defects in previous pleadings have no effect on the present pleadings. In my view therefore the learned trial magistrate decision to dismiss the appellants Preliminary Objection is proper. I therefore find no merit in this appeal which is hereby dismissed with costs.

Dated and Signed at Bungoma this 23rd day of May, 2019.

S.N. RIECHI

JUDGE